# FITTING ROUND PEGS INTO SQUARE HOLES: MULTI-LAYERED GOVERNANCE AND INTERNATIONAL ORGANISATIONS

JOHN HOPKINS[*]
Deputy Director, Institute for European Public Law and Lecturer in Law, Law School, University of Hull, England.

Citation: Hopkins, John --- "Fitting round pegs into square holes: multi-layered governance and international organisations" [2002] CanterLawRw 8; (2002) 8 Canterbury Law Review 440

## I. INTRODUCTION

International and supra-national governance has reached an unprecedented level over the past half century. At an international institutional level this trend has been most clearly evidenced by the establishment of the World Trade Organisation but less publicised attempts, particularly to reduce barriers to trade, have become commonplace in the recent past. This phenomenon has been rather glibly described as 'globalisation' although there remains huge debate as to what exactly this term actually means.[1] Whatever the finer details of this phenomenon there is little doubt that the internationalisation of decision-making through the growth of international organisations was one of the key development in the second half of the twentieth century.[2]

In practice, and notwithstanding the WTO example, the internationalisation of decision-making has been most evident not on a global scale, but rather at the continental and sub-continental level. The most notable example of this is found in Europe but it would be wrong to see the development of the European Union as an isolated example of such supra-national decision-making. Although clearly the most advanced example of this phenomenon the EU is not alone. Perhaps driven by the perceived success of the EU, North America, West Africa and Asia have all experienced the development of such supra-national entities.[3] Driven partially by growing internationalisation and partially as a defence against it, supra-national power blocks are a growing feature of international relations. The extent of this phenomenon has led Professor Keohane to memorably observe that 'to analyse world politics in the 1990s is to discuss international institutions'.[4] The existence of such supra-national institutions is not in itself new. Only a cursory glance at the history of international law is needed to confirm that states have long united and established institutions with superficial similarities to those that have developed recently.[5] Nevertheless, there are fundamental differences in the current trend that

distance it from previous incarnations. In the pre-war era such unions, although not uncommon, largely dealt with the individual policies as and when they arose. They were concerned not with the expansion of governance but in easing the relationships between states in particular policy areas where such relationships needed institutional support. As such they were part of the traditional 'game of states' and not a new phenomenon. Crucially, the issues such unions regulated did not interfere significantly with domestic policy. The international organisations of today, by contrast, are not subject specific in their focus. Instead they are focused on wider concerns particularly, but not exclusively, the development of trade. Such wider rationales require policies, traditionally regarded as domestic and thus regulated by national constitutional provisions, to be handled by supra-national and international institutions. Although it would be a mistake to assume that such developments mean the end of the state itself the traditional division between international and domestic policy and by association international and domestic law are being eroded.

The softening of the traditionally hard border of the nation-state[6] has had a significant impact on the study of law and legal systems. Until now, those who have studied the international level of law, with some notable exceptions, have sat rather isolated from those who study the domestic legal order. The discourses of public and public international law, with some notable exceptions, rarely come into contact with each other. Each has its own sphere of knowledge, its own principles and its own rules. Those who study and analyse these rules and the principles behind them may exchange pleasantries at conferences and even the odd conversation in the faculty common room but the two sub-species of the genus droiticus publicus do not normally interact. They are happy in their ignorance. The onset of 'globalisation' and the use of supra-national institutions to create policy with a domestic element are forcing the barrier between domestic and international spheres of law to be gradually reassessed. For the public lawyer such changes require a greater knowledge of the institutions of the supra-national level that are playing an increasingly influential role in developing policy at the domestic sphere. For the international lawyer the change is, if anything, even more profound. Public international law has largely shied away from engaging with traditional public law concepts such as accountability and democracy. Now that international decisions are having such an impact on the domestic sphere good governance demands that the principles applied to domestic decision-making must be applied more generally.

The 'internationalisation' of public law is a topic far too wide to tackle in any great depth here.[7] This short work instead focuses on an aspect of this wider phenomenon that is likely to prove of increasing relevance as the globalisation trend continues. By using international obligations to create domestic regulations domestic institutions previously charged with such a role have been bypassed. The clear loser in such a development is the national legislature. The democratic deficit at the heart of the EU has become the classic example of this phenomenon. However, a second, less acknowledged democratic deficit applies to sub-national governments in relevant states.

The unitary state is no longer the dominant mode of government it once was. One third of the world's population now live in constitutional systems classed as federal with sovereignty formally divided between the national and the regional levels. A far greater number live in systems where the regional tier, although lacking formal sovereignty, exercises de facto independence over particular aspects of domestic policy. Even in systems that lack formal regional autonomy, the regional and local levels are an important part of the democratic structure of the state. The internationalisation of domestic policy has the effect of neutralising the operation of these bodies as their autonomy is restricted by regulations, over which they have little or no control. The European constitutional experiment, which led ultimately to the creation of the European Union, has also seen the growth of regional governments of various types in the years since 1945. The combination of the supra-national development of the European Union and the European regional revolution has meant that Europe has been at the forefront both of the incorporation of international and domestic public law but also the issue of how sub-national governments fit into the new internationalising system. For this reason, the following paper focuses on the European experience as a case study. Put simply, how can systems of multi-layered sovereignty fit into the new world order and does Europe hold any answers? The preliminary conclusion to be drawn is that the current international order holds out little hope for the incorporation of sub-national units into the globalised system. Equally, attempts within the EU to resolve similar problems have not given us answers to this difficult question. European experiences do, however, show us that if we wish to move towards a system of accountable and democratic decision making at the supra-national level we must reconsider the basic principles of international law.

## II. The Demise of the Sovereign Nation-State

The system of international law built up from the time of Grotius pre-supposes the existence of units of government, states, which have the capacity to speak for their territories. In a non-democratic age when these ideas developed, niceties about the accountability of such decisions were not considered. The Sovereign could bind those beneath him and failure to do so was a breach of the protocols that became known as the Law of Nations and later what Bentham referred to as 'international law'. The introduction of democracy into a number of these states particularly during the twentieth century did little to upset the system. As long as the body that made such decisions still bound the state, how it did so was unimportant. The system remains based upon a simple pre-supposition, namely the existence of such a body or institution to bind the entire territory. It is a system of law based upon the existence of nation-states. This principle can be found throughout the corpus of modern international law but reaches its clearest genesis in Articles 7 and 46 of the Vienna Convention of the Law of Treaties. Article 7 empowers the executive of the nation-state to represent the state as a whole, while Article 46 ensures that states cannot rely upon their own domestic constitutional arrangements for failure to apply a Treaty unless accepted in advance by the other parties. These articles were required for good practical reasons. States should not be allowed to renege on their international agreements by spurious reference to their own domestic arrangements. Nevertheless, these Articles, which were largely a codification of existing custom in 1969 emphasise that

international agreements are between nation-states. Sub-national units are not welcome at the national table.

## III. The Growth of Multi-Layered Democracy

This focus on the sovereign nation-state as the key player in the international game was sustainable for as long as deviations from the sovereign model were limited. This was largely the case up until 1939 but the past fifty years has seen more than one revolution in governance, particularly on the European continent. At the same time that states have been combining into continental blocks and administering ever greater areas of policy through the medium of international agreement, changes have occurred within the boundaries of many so-called sovereign units. Sub-national policy making and the division of' sovereign' power between various levels of government has become common throughout much of the globe. Nowhere has this been more evident than in Europe, but this should not blind us to the fact that from Russia to India regional governments exhibit significant policy autonomy within their nation-states. Even in classically unitary states such as France and New Zealand, the sub-national governments are playing an increasingly active role in the development of their regions and localities. The trend away from the single national policy area is widespread and ongoing.

The nation-state is widely perceived incapable of delivering successful policy throughout a territory that may have little to bind it. It is at once too big and too small to deliver the needs of its population something accentuated by globalisation itself.[8] Although it would be a mistake to assume that such developments mean the end of the nation-state, it is increasingly perceived as detached from the needs of citizens. In response local and regional levels are seen as more representative of citizen interests than the emasculated nation-state.[9]

Europe has experienced the growth of the sub-national tier, particularly in the form of the region, to an extent unparalleled elsewhere. From a situation in 1939 where Europe consisted entirely of unitary nation-states to the current situation where every large EU member state and may of the smaller ones operate a form of regional devolution European constitutionalism has undertaken a very long journey in a very short time. Driven by micro-nationalist movements, democratic reform agendas and functional reality the autonomous region has become an established feature of the European constitutional fabric.[10] How Europe has adjusted to this new phenomenon provides a case study for the internationalisation of public law and the growth of policy outside the confines of the nation-state. Can the traditional nation-state and the division between international and domestic law cope with challenges to the unity of the sovereign state?

## IV. The International Question in Multi-Level Democracy

The issue of international relations and multi-level systems of government is not a new one. In fact it is as old as federalism itself. The traditional view of the federal model saw authority divided, at least in relation to international matters, along strictly horizontal lines. The federal or national level administered the actions of the state in relation to the external world, while internally, the constituent states would develop independent domestic policy within their sphere of autonomy. This arrangement was described over two centuries ago as 'external unity, internal diversity'.[11] By using this principle the inclusion of the multi-layered state in the world of the unitary state was made simple.

This state of affairs was acceptable for as long as international matters were largely limited to 'affairs of state' associated with the federal level. Such a distinction is no longer sustainable. Today international agreements are more likely to deal with issues of domestic regulation than they are with matters of peace, war and global politics. This presents a particular problem in any multi-layered state. Put simply, should the right of the federal level to deal with international relations extend to allow it to impose any agreement reached domestically, even when areas of sub-national autonomy are affected? Conversely, should the regional or local tier have the power to reject decisions taken at the international level in their fields of autonomy? If the latter approach is taken then the federal state might find itself unable to operate in the international field, given the requirements mentioned above.[12] If the former route is taken, the regional level could find its powers increasingly eroded as international agreements are undertaken on its behalf by the federal level and then implemented domestically using the 'international' competence of the national state.

## V. Multi-Level Democracy and the European Question

The growth of the European Union has added an extra dimension to the international question in the European context. The European Union is asui generis governance structure with a multi-level and asymmetrical allocation of sovereignty. This situation is not always recognised dejure but few doubt that this is the de facto situation.[13] The growth of the European Union has had a number of impacts upon the international legal order in Europe. The first and most obvious has been the transformation of international relations between the Member States of the European Union. Issues which would have previously been dealt domestically, or perhaps through international agreement, are now resolved through the institutions of the European Union. These decisions cut deep into the 'domestic' authority of the Member States. Most crucially, they are enforceable both through the judicial institutions of the European level and the domestic courts of the Member-States.[14] The European Court of Justice, in a series of judgments has made it abundantly clear that Member States cannot rely upon provisions in their domestic constitutional structures to avoid the application of European obligations. Specifically, the ECJ has ruled that that the Member State is responsible for a failure to implement EU law by a regional government.[15]

If a Member State cannot guarantee compliance it will be open to constant challenge by the Commission and rebuke by the ECJ. This occurred frequently in Belgium, particularly in relation to the actions of the government of Wallonia, until the most recent Belgian constitutional reforms.[16] Although the reality may be different, in common with the tradition of international law, the Member-State is the only recognised participant in the European policy process.

In many policy areas authority within the EU now hovers somewhere between the international and the domestic level at the sui generis European level. The impact for the sub-national governments of Europe, which have grown up in parallel to the EU has been profound. Granted autonomy domestically, they have found it transferred to the European level where most decisions are taken collectively by Member State executives. The Member States have also been affected by the reforms, both domestically with the emasculation of national parliaments (the so called democratic deficit) and in the foreign policy sphere. The Commission can now represent the European Union collectively on the international stage on a limited range of matters. Most significantly the existence of a common foreign policy pillar in the Union Treaty marks a further move towards European foreign policy. Although this pillar of the Union remains weak it is clearly an aspect of the Union that is likely to develop overtime. When it does, it will pose further questions as to how the various levels will interact with the international legal order. The methods used to incorporate Europe's regional tier into the current structure may shed some light on these looming issues of multi-level governance and international law.

## VI. Regional Participation in the European Union

The involvement of the regional tier in the decision making process of the European Union is achieved through one of three methods. Regions can participate through the mechanisms of their parent nation state; through the medium of the Council of Ministers (the primary legislature of the EU) or through the regional institution, the Committee of the Regions. In each case, regional penetration of European decision-making processes has been only partial and has been achieved against a backdrop of Member-State opposition. Member-States are not keen to address the multi-layered governance issue. Many national governments regard their constituent regions as more pest than partner. In extreme cases, it might even be a useful tool in imposing a policy upon the regional tier that would be politically or constitutionally impossible to impose under the domestic system. This led to a situation that the German Länder described as the open flank whereby the constitutionally protected regional autonomy of the constituent states was steadily eroded by European decisions. This situation has been progressively encountered by most of the legislative regions in the European, particularly the Spanish autonomías, the Belgian Regions/Communities and more recently the devolved regions/nations of the United Kingdom.[17] The ability of each regional system to resolve the 'open flank' has been directly related to the domestic power that the regions are able to wield. This is no more clear than in the case of Belgium. The power and autonomy of the Belgian regions is an extreme example of the concept of the multi-layered state. Driven by strong micro-nationalist pressures, Belgium is now divided into a complex series of Regions (Wallonia, Brussels and Flanders) and

Communities (French, Flemish and German).[18] A key factor in their autonomy is the extreme version of vertical federalism utilised in the Belgian federation. Each unit of government is responsible for a number of (theoretically) exclusive powers. The legislation emanating from the various levels of authority are constitutionally equal which leads to a particularly acute version of the international question. The answer proposed by the Belgian state has been to grant the regional organs responsibility for international matters within their fields of competence. This system answers the international question mentioned above in perhaps the most complete manner possible. The degree of international persona granted to the Belgian regions is a logical extension of the equality of laws within the Belgian state. The Belgian federal level lacks authority to legislate in the areas of regional or community competence and as such has no power to impose international or European obligations on the regional and community governments. Direct regional and community involvement is therefore required to ensure Belgium has an effective international presence in the areas in which they hold exclusive competence. Many of Belgium's national partners have had difficulty in coping with this state of affairs and a number are clearly uncomfortable with it. To some extent this reflects unease at encouraging a regional presence on the international stage that may be demanded by troublesome provinces in other states. For this reason, the Belgian federation has experienced some difficulties in projecting its domestic structure into the international arena.[19]

This system although answering the international question does so in a way that creates difficulties for Belgium as a member of the European Union. The Belgian state is the Member State responsible for the application of European obligations. A series of cases exposed the inability of the Belgian state to enforce such obligations and led eventually to the resolution of this issue by a number of agreements between the Belgian state and the regional components.[20] These agreements ensure that regional and community governments must agree to the Belgian position in the Council of Ministers when their competences are under discussion.[21] The Belgian position as presented at the Council is thus a negotiated one between the various regional institutions of the Belgian state. It is rare for no agreement for be reached (this has happened on only two occasions) as an abstention can have a significant impact on decision making within the Council. A compromise position is better than no position at all. In return, the regions/communities agree to abide by European law and take individual responsibility for a failure to comply. This is achieved through a specific domestic arrangement, as it is still the Belgian state, not the sub-national entity that has to formally face the enforcement procedures.

In Germany too, the powerful regional tier has, after many attempts, had some success in closing the 'open flank' that it first recognised. The involvement of the German Länder in the creation of European decision-making remained largely informal until the introduction of the Single European Act (SEA) in 1987 presented the Länder with an opportunity to put pressure on the federal into granting them more formal involvement. The Act (which amended the Treaty of Rome to make decision making at the European level easier through an increase in majority decision making) required changes to the German constitution and thus the approval of the Bundesrat. This second chamber of the German government comprises Länder executives and thus gave the regions the opportunity to squeeze several concessions from the federation.[22] .

The negotiations around the 1992 Maastricht Treaty on European Union gave the Länder another opportunity to flex their political muscles. Only this time they did not act alone. Unlike in 1987, the Länder did not restrict their campaign to the domestic political arena but lobbied hard in both Brussels and Strasbourg. By creating a pan-European regional lobby, the regions entered the political arena as a truly European phenomenon. Rather than limiting their actions to domestic matters and operating within the context of a national political system, regions were now operating on a European level. This marked a defining moment in the development of the regional tier in the EU.

The climax of the German region's campaign came somewhat surprisingly with the re-unification of Germany. The Länder hi-jacked the inter-governmenal bodies established to discuss the implications of this constitutional change and instead pressed for a Europe article in the Basic Law. Again, a united front was maintained and the ultimately successful campaign led to the introduction of a new Article 23. The Länder actually set out to change Article 24 (concerning international relations) but instead settled for the new Article 23 (which had originally covered the accession of the Eastern Länder to the federation). The new article covers several aspects of Länder/EU relations, but the key paragraphs are 4, 5 and 6:

> 4) The Bundesrat is to participate in the formation of the will of the Bund insofar as it would have to participate in a corresponding internal measure or insofar as the Länder would be internally competent.
>
> 5) Insofar as in a particular area of exclusive competence of the Bund interests of the Länder are affected of insofar as in other respects the Bund has the right to legislate, the Federal Government is to have regard to the expressed opinion of the Bundesrat. If the legislative powers of the Länder, the organisation of their authorities or their administrative procedures are affected in a crucial respect, the view of the Bundesrat is, to this extent, to be taken into account as the determining factor in the formation of the will of the Bund; at the same time the responsibility of the Bund for all the Länder is to be preserved. In matters which can lead to increases in expenditure or reduction in income for the Bund, the consent of the Federal Government is necessary.
>
> 6) Where essentially the exclusive legislative jurisdiction of the Länder is affected the exercise of the rights of the Federal Republic of Germany as a member state of the European Union shall be transferred by the Federation to a representative of the Länder designated by the Bundesrat. Those rights shall be exercised with the participation of and in agreement with the Federal Government; in this connection the responsibility of the Federation for the country as a whole shall be maintained.[23]

These paragraphs amount to the first recognition that the EU decision-making is not international in the traditional sense. It is no longer acceptable to allow the national tier exclusive rights to deal with European matters such is their impact on sub-national autonomy.

Outside the examples of Germany and Belgium, individual regional involvement in the European decision-making process is largely limited to the right of the regional tier to implement European decisions and be consulted when such decisions affect their competence.[24] In the UK this role is formalised in a number of concordats between the Scottish, Welsh and Northern Irish executives and their counterparts at Whitehall.[25] In the UK examples, the devolved entities although granted the right to participate in European affairs do so merely at the discretion of the UK government. European and international affairs remain firmly within matters reserved to the UK level.[26] This may prove something of a poison chalice if the UK government's position does not accord with that held in Edinburgh or Cardiff. Such negotiations must be undertaken in confidence and the devolved institutions may be faced with the prospect of breaking their confidentiality and risking exclusion from such processes in the future or keeping their peace and risking unpopularity at the ballot box.

The ability of European regions to influence policy at the European level through domestic processes is thus limited to the extent that they are able to force concessions through their domestic constitutional circumstances. Even if this can be achieved it does not solve the 'international' question, or at least only at the expense of the autonomy of the sub-national tier. The single front of the national level requires that the regions agree a position if they are to be heard outside their borders through the mechanisms of the nation-state. Such a position will be national decision, merely one decided by regional executives, a group which are probably even less suitable to make such policy that the national executive. Given the problems associated with gaining recognition for the multi-layered system of government through the nation-state itself, does the involvement of the regions in the European institutions themselves offer us a better model?

## VII. The EU Institutions and the Regional Tier

Until 1994 the regional tier had no formal presence at the European level. Such involvement as did exist was limited to ad hoc consultation procedures and informal contacts. The Maastricht Treaty on European Union, under pressure from the more powerful regions, introduced significant changes that have, prima facie, increased the regional involvement at the European level. The most significant changes are now found in Articles 146 and 198 of the amended Treaty on European Union. The new Article 146 introduced a small but potentially significant amendment that allows regional ministers to sit in the in the Council of Ministers, the key inter-governmental of the EU. Article 198 established the Committee of the Regions (CoR), to represent the sub-national tier of government at the European level. The previous incarnation of Article 146 was a classic example of the Member-State focused nature of the European Union, stating as it did that only members of the Member-State government could represent the Member-State in the Council. The regional tier was thus completely excluded from the Council even if the Member-State wanted to have a regional minister represent the state as a whole. Under the Maastricht Treaty the wording was subtly altered at the insistence of the Belgian delegation (and in effect the Belgian Regions/Communities acting in concert with their regional allies). Member-State representatives must now be of ministerial rank and authorised to act for

the Member State but need not be part of the national government. A number of states have now made use of the new article, noticeably the UK, Germany and Belgium, although it is still Belgium where it has the most impact due to the powerful nature of its regional tier. However, does the presence of regional ministers within the Council of Ministers have any practical effect? The problem with giving regional access to the Council is that the regional representatives still sit as part of larger national delegation. Even in the Belgian example whereby the regions/communities play a significant role in creating the national position, when it comes to voting, the delegation votes as a single block. This creates a number of legitimacy problems. Firstly, the regional minister only has a democratic mandate from his territory but represents the entire Member State within the Council. Secondly, as the regional votes are still administered as a single block the position as presented is still a national position, merely one negotiated by regional and national government ministers. Why then, are regional ministers present in the Council?

The first reason appears to be information. By being within the Council negotiations proper, the regions are aware of how both their concerns and the wider discussions are progressing, without relying on the national government as a conduit for such information. The second benefit for the Member-State as a whole is one of expertise. If a question of agriculture policy is discussed in Council, it is necessary for each delegation to have the facts at its disposal. As Belgium has no Agriculture Minister, it is necessary to use the regional ministries or risk being outmanoeuvred during the discussions. Naiveté at the European negotiating table is a significant disadvantage. Finally, their presence in the Council clearly adds to the status of the regional ministers in the Council. If nothing else, it is a visible reminder of the importance of the regional tier in the various federal and regionalised Member-States. However, by stuffing the regional presence at the European level into a structure created to represent sovereign Member-States, the international question in relation to Europe is not solved. Although the regions may be present at Council meetings (many more have some presence in the delegation than actually represent the Member-State) their presence is little more than a bauble to assuage the pride of the regions. It is not a long term solution to the question of multi-layered sovereignty and international organisations. So far, it can be clearly seen that attempts to answer the 'international' question' in Europe with reference to nation-state centred systems do not resolve the underlying issues of good governance. They enlarge the role of the executives, diminish the participation of the legislatures and stretch democratic accountability to breaking point. To resolve these issues we must fundamentally alter our approach to such questions and consider new institutions and systems to incorporate the reality of multi-layered governance. This has occurred in the European Union with the creation, as a result of the Maastricht Treaty, of the Committee of the Regions.

Although much fanfare accompanied the birth of the CoR in 1994, its operation has been something of a disappointment. Part of the problem concerns the lack of powers allocated to the Committee. It is merely advisory and although it must be consulted on a number of matters, the impact of these opinions is not always evident. The list of advisory matters was significantly increased in the aftermath of the Amsterdam Treaty and now includes transport, agriculture, environment and research matters. Although these improvements in its consultative role have

increased its visibility within the EU, they have not resolved the key problem. This comes from the structure of the Committee itself, a structure that epitomises the problems of incorporating multi-level governance structures into international or supra-national decision-making.

Although the CoR is commonly referred to as a regional body this is a misnomer. The organisation of sub-national government is very different across the Member-States of the EU and as one would expect representation in the Committee varies considerably. The more powerful regions have a major presence on the Committee through control of their Member State representation. For example, the German Länder have taken twenty one of the twenty four seats allocated to the Federal Republic with the remaining three being granted to representatives of the municipalities. England by contrast, lacking a regional tier, is represented by local council representatives appointed by the central government. In the case of France where a regional tier does exist significant representation is given to representatives of local government groupings. The various local governments represented therefore have very different powers and therefore priorities. The Minister-President of Bavaria has very different concerns from a local councillor from East Yorkshire.

The appointment of representatives from Member States introduces a further unhelpful dynamic within the Committee. The Committee can become a discussion group for national delegations of local/regional representatives, rather than a truly regional/local debating chamber. The attitude of national delegations varies markedly in each Member State. The representatives of Belgium, Germany, and to a lesser extent Spain, represent the interests of their individual regions but in countries such as Italy there is a tendency to present a united Italian position. In Belgium, Germany, Spain and Austria, each region is individually represented but this is not the case everywhere. In these latter examples the delegates are appointed to represent local/regional government in their Member State as a whole, not to represent the interest of a particular territory. Lacking an individual mandate these representatives tend to construct national positions thus defeating the purpose of the Committee. The more powerful regions have clearly become disillusioned with the Committee and have to some extent withdrawn from it. The Minister President expressed the long term vision of the stronger regions in a statement on 1995:

> The major long-term goal remains the further development of the Committee of the Regions into a 'third chamber', alongside the European Parliament and Council of Ministers and with co-decision powers in certain areas.[27]

The difficulties expressed above have made the achievement of this goal unlikely at least in the short term. For this reason, the more power regions appear to have taken their bat and ball home for now. It is this abandonment of the CoR in favour of regional influence through their individual Member States that accounts for the lack of success the CoR has had in influencing the Amsterdam Treaty and Nice Treaty revisions. When abandoned by its more powerful

members, the Committee is easily ignored.[28] This isolationism on the part of the German Länder and the Belgian regions has recently and spectacularly ended with the signing of the Flanders declaration.[29] This document is a clear statement of intent and suggests that the regions finally recognise that only collective action and ultimately an effective regional institution will solve the problem of multi-level democracy within the European Union.

## VIII. CONCLUSION

The involvement of European regions in the developing supra-national infrastructure of the European Union gives us a degree of insight into the future of international law and the law of international organisations. The future does not look simple. Although the current system can probably cope, at least with the current level of multi-layered sovereignty, the traditional structure of international law appears unsustainable in the longer term. The traditional sovereign state model when bent to fit the realities of multi-layered governance becomes increasingly cumbersome with greater and greater emphasis placed upon the role of the executives. Lines of accountability that are already stretched to breaking point through executive representation of the nation-state are entirely snapped when applied to multi-layered systems. In such systems the decision-making process increasingly employs fictions to ensure that the game of states can continue and the myth of the sovereign nation-state can endure. Those signing agreements in the name of the nation-state are increasingly detached from their electorates and in extreme cases lack constitutional responsible for their decisions.

It is only when the mould is broken and the sub-national levels are free to conduct affairs themselves particularly through supra-national institutions which reflect their interests that something approaching a solution can even start to be glimpsed. Ironically it is exactly these areas, which explicitly challenge the sovereign nation-state both in its practical form and as a concept that have proved so problematic to develop. Belgium's experiments with sub-national diplomacy have met with problems when applied to the international stage and internal agreements have been required to maintain the fiction of the sovereign nation-state. In addition, the great white hope of the European regions in the mid-1990s, the Committee of the Regions, lies becalmed and largely forgotten in 2002.

Whatever the final result of the European experiment, it seems unlikely that the regions will continue to be ignored. The increasing domestication of international decision-making demands that issues such as these be addressed. Multi-level governance is a phenomenon that will only grow as globalisation continues and with it will come difficult questions for both international and domestic public law. This brief resumé of tentative attempts to address these issues in the European Union cannot begin to provide answers. It might, however, be a start towards at least asking the right questions.

1. See, eg, R O Keohane and J S Nye Jr, 'Globalization: What's New? What's Not? (And So What?)' (2000) 118 Foreign Policy 104-20.
2. The literature on this subject is immense, but a good introduction to the growth of International Organisations can be found in P Sands and P Klein, Bowett's Law of International Institutions (5th ed, 2001).
3. The North American Free Trade Association and The Economic Community of West African States two well known examples. The Asia-Pacific Economic Co-operation and The South Asian Association for Regional Co-operation are less developed Asian equivalents.
4. ROKeohane, 'International Institutions: Can Interdependence Work?'(1998) 110 Foreign Policy 82.
5. An early history of such organisations can be found in G J Mangone, A short history of International Organisation (1954).
6. J Hopkins, Devolution in Context (2002) 14-6.
7. It is noteworthy that the forthcoming fifth edition of the standard UK constitutional text, The Changing Constitution (2002) will include a chapter on this topic.
8. R Watts, Comparing Federal Systems (1999).
9. See M Keating, The New Regionalism in Western Europe (1998).
10. Hopkins, above n 6.
11. B Ehrenzeller, R Hrbek, G Malinverni and D Thürer, 'Federalism and Foreign Relations' (Paper presented at the International Conference on Federalism, St Gallen, 2002 ) 55.
12. Article 46, Vienna Convention on the Law of Treaties.
13. See J Weiler, The Constitution of Europe (1999).
14. See Costa vENEL [1964] ECR 585 and its subsequent jurisprudence. Francovich v Italy [1991] ECRI-5357 has introduced the possibility of state liability to individuals for failure to implement.
15. Commission v Italy [1970] ECR 961, Commission v Italy [1983] ECR 1057 and more recently Commission v Spain [1998] ECR I-3301. See also I Aurrecoechea, 'The role of the Autonomous Communities in the implementation of European Community Law in Spain' (1989) International and Comparative Law Quarterly 90; J Hopkins, 'Regional Government in the European Union' in S Tindale, The State and the Nations: The Politics of Devolution (1996).
16. Commission v Belgium [1998] ECR I-4291; [1998] ECR I-5063.
17. In a recent speech, Jack McConnell, the Scottish first Minister referred to around 80% of Scottish devolved policy having a European element.
18. Theo Lefèvre the former Prime Minister once described his country as 'a happy country comprising three oppressed minorities'.
19. R Senelle, 'The Role of the Communities and the Regions in the making of Belgian Foreign Policy' (1999) 5 European Public Law 4.
20. Opcitn16.
21. See principally the co-operation agreement of 8th March 1994 on the Representation of the Kingdom of Belgium within the Council of Ministers and the European Union.
22. C Jeffery, 'The Länder Strike Back: Structures and Procedures of European Integration Policy Making in the German Federal System' (Discussion Papers in Federal Studies, 1994).
23. German Basic Law, Article 23.

24. The exception to this is the Åland islands government which has extensive consultation and decision making rights in relation to Finland's position at the Council of Ministers.
25. Memorandum of Understanding B, Concordat on Co-ordination of European Policy Issues.
26. Scotland Act 1998, Sched 5(7).
27. Committee of the Regions, Institutional Reform (Brussels: EU, 1995).
28. J Hopkins, 'The Dog That Didn't Bark: Regions and the IGC' in M Lazarowicz (ed), New Scotland, New Europe: Scotland and Expanding European Union (1999).
29. The Flanders Declaration was originally signed by seven legislative regions (Scotland, Flanders, Bavaria, Wallonia, Salzburg, Catalonia and North-Rhine Westphalia). It has now been endorsed by 45 European legislative regions. It calls for a greater role for the regional tier in European affairs and is intended to influence the on-going European Constitutional Convention.